IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 03.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.351 of 1999

M/s.K.J.Bastian .. Appellant/Complainant

vs.

1.M/s.Electro Wire Link Industries
rep. by its Managing Partner
Peer Mohamed A.K.
29, Post Office Street,
Mannady, Chennai-1.

2.Peer Mohammed, A.K.
Managing Partner,
M/s.Electro Wire Link Industries
29, Post Office Street,
Mannady, Chennai-1. .. Respondent/Accused 1 & 2

Prayer: This appeal under Section 378(4) of Crl.P.C has been preferred against the Judgment dated 17.2.1999 in C.C.No.5095 of 1997 on the file of the Court of VII Metropolitan Magistrate, George Town, Chennai.

For Appellant : Mr.K.Ashokan, Senior Counsel,
For M/s.Gita Ashokan

For Respondents : Mr.M.Rajaraman

JUDGMENT

This appeal has been preferred against the judgment in C.C.No.5095/1997 on the file of the Court of VII Metropolitan Magistrate, George Town, Chennai. The complainant is the appellant herein.

2. The brief facts in the complaint preferred by the complainant for the offence punishable under Section 138 of Negotiable Instrument Act, are as follows:-

In connection with the purchase of wires from the complainant-company the accused had drawn a cheque for Rs.2,00,489/- on 31.12.1996. When the

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cheque was presented in the bank on 06.06.1997, the same was retuned with an endorsement that "it exceeds the arrangements". Hence the complainant has issued a notice to the accused on 18.06.1997, but the accused has not chosen to send any reply. Hence the complaint.

3. After taking the sworn statement of the complainant, the complaint was taken on file by the learned Judicial Magistrate and the sommons were issued to the accused for appearance. On appearance, the copies under Section 207 of Cr.P.C. were furnished to the accused and when the offence was explained to the accused they pleaded not guilty. On the side of the complainant, P.W.1 to P.W.4 were examined and Ex.P.1 to P.5 were marked. On the side of the accused no oral evidence was let in, but Ex.D.1 to D.4 were marked.

4. P.W.1 in is evidence would depose that he is working in the complainant-company as a manager and the complainant-company is indulged in hardware business and the accused are having transaction in purchasing goods from the complainant-company from the year 1993 and that he was having a current account for the transactions and that the accused had drawn a cheque for Rs.2,00,489/- dated 31.12.1996 and gave it to the complainant towards the discharge of the debt. When the said cheque was presented with the bank on 5.6.1997 the said cheque was returned with an endorsement "Exceeds Arrangements". Ex.P.1 is the returned cheque. Ex.P.2 & P.3 are the intimation memo received from the bank regarding the return of the cheque. Ex.P.4 is the copy of the notice dated 18.6.1997 issued to the accused. Ex.P.6 & P.7 are the acknowledgments. Ex.P.7 is the authorization letter.

4. P.W.2 is an Accountant in the Union Bank, Sembuthas Branch, Chennai, and that he is working in the current account department. P.W.2 would depose that the accused is having a current account and also availed cash credit facility and that Ex.P.1-Cheque came to the said Branch of the Bank on 5.6.1997 and since there was no sufficient funds in the drawer's account the said cheque was returned with an endorsement "Exceeds the Arrangements". Ex.P.2 is the intimation of the bank of his branch. Ex.P.8 is the statement of accounts maintained in the bank.

5. P.W.4 is the cashier of the complainant-bank. She would depose that the accused had purchased steel wires from the complainant-company and for that purpose the accused have maintained an account with the complainant. Ex.P.9 is the invoice dated 19.10.1995 for a sum of Rs.79,359/-, Ex.P.10 is the invoice dated 12.4.1995 for a sum of Rs.21,498/-, Ex.P.11 is the invoice dated 25.5.1995 for a sum of Rs.20,924/-, Ex.P.12 is the invoice dated 02.03.1996 for a sum of Rs.1,51,100/-, Ex.P.13 is the invoice dated 13.11.1995 for a sum of Rs.60,441/-, Ex.P.14 is the invoice dated 15.4.1996 for a sum of Rs.37,190/-, Ex.P.15 is the invoice dated 8.5.1996 for a sum of Rs.1,40,344/-.

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6. When incriminating circumstances under Section 313 of Cr.P.C. were put to the accused, the accused denied his complicity with the crime. On the side of the accused no oral evidence was let in. Ex.D.1 to D.4 were marked. After going through the oral and documentary evidence, the learned trial Judge has come to the conclusion that the offence punishable under Section 138 of NI Act has not been proved against the accused and consequently dismissed the complaint thereby acquitting the accused, which necessitated the complainant to prefer this appeal.

7. Now the point for determination in this appeal is whether the judgment in C.C.No.5095/1997 on the file of the VII Metropolitan Magistrate, Gorge Town, Chennai, is liable to be set aside for the reasons stated in the memorandum of appeal?

8.The point:-

8(a) The learned senior counsel Mr.Ashokan, appearing for the appellant/complainant, would contend that the learned trial Court has dismissed the complaint on the ground that the complainant has failed to prove that Ex.P.1-Cheque, which was bounced on presenttion, was drawn in favour of the complainant only to discharge a debt, which is due to the complainant in the course of business. The learned senior counsel focused the attention of this Court to Ex.P.19-statement filed by the complainant and contended that the learned trial Court has observed in its judgment at para 15 that according to the accused he has partially discharged the loan amount to the tune of Rs.98,000/-, which was also admitted by P.W.1 in the cross-examination, but the same was not given credit to in Ex.P.19. The learned senior counsel would contend that as per Ex.P.19-statement a sum of Rs.37,190/- was credited on 15.4.1996 and another sum of Rs.59,828 has been credited on 8.5.1996 and as per Ex.P.5 another sum of Rs.1,491/- has been credited towards the amount due to the complainant and that he would contend that the reasoning stated by the learned trial Judge for the acquittal of the accused on the above ground cannot be sustainable. But if we add Rs.37,190/- + Rs.59,828/- + Rs.1491/- it comes to a total sum of Rs.98,509/-. But as per Ex.D.1-invoice the goods supplied by the accused is for Rs.98,509. The said goods were supplied to the complainant on 19.11.1996. But with regard to this supply of goods there is no entry in Ex.P.19-statement at all. Further it is pertinent to note that even Ex.P.19 it has been stated that a sum of Rs.2,00,489/- is inclusive of 24% interest per annum charged up to 21.5.1997. So as per Ex.P.19 a sum of Rs.2,00,489/- is due to the complainant only on 21.5.1997, whereas Ex.P.1-cheque is dated 31.12.1996. For this discrepancy P.W.1 would say that Ex.P.1 was handedover to him only after 21.5.1997. But there is absolutely no pleading in the complaint preferred by the complainant to the effect that a post dated cheque has been given for the amount due including the future interest at the rate calculated till 21.5.1997.

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8(b) Section 138 of the Negotiable instrument Act runs as follows:-

"Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

PROVIDED that nothing contained in this section shall apply unless:-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation:-For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

The explanation to Section 138 of NI Act clearly says that debt or other liability means a legally enforceable debt or other liability. It is clear from Ex.P.19 that on the date of drawal of cheque i.e, on 31.12.1996, the amount due to the complainant is not Rs.2,00,489/-. But the amount due only on 21.5.1997 to the complainant is Rs.2,00,489/-.

8(c) The learned counsel relying on 2002 MLJ (Crl) 257 (Raghunathan Vs. Selvarajan), contended that the Court has to presume that the cheque had been issued for a debt or liability and that presumption is rebuttable and there is no contra evidence let in by the accused. The facts of the above said case are as follows:-

"The appellant filed a private complaint against Selvarajan-accused for the offence under Section 138 of the NI Act. The trial Court convicted the accused. The first appellate Court acquitted the accused. Hence, the appeal before this Court.

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The first appellate Court while acquitting the accused has observed in its judgment that the complainant did not prove that the cheque was issued towards the liability, and accepted the case of the accused that the said cheque was given as security while there was an oral agreement of sale between the complainant and the accused, without considering the evidence of P.W.1/complainant proving the said aspect, taking into account, Sections 118 and 139 of the Negotiable Instruments Act.

While setting aside the first appellate Court's Judgment, the then learned judge of this Court (Now the Chief Justice of Jarghand) has held as follows:-

> The judgment erroneously proceeds on the basis that the burden of proving consideration for a dishonoured cheque is on the complainant. It appears that the learned Judge had lost sight of Sections 118 and 139 of the Negotiable Instruments Act. Under Section 118, unless the contrary was proved, it is to be presumed that the Negotiable Instrument (including cheque) had been made or drawn for consideration. Under Section 139 the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. Thus in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebutable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused."

There cannot be any different view against the above dictum. But in the case on had as per explanation to Section 138 of the NI Act, the complainant must prove that there was a subsisting debt to which Ex.P.1-cheque was drawn by the accused. It is clearly seen from Ex.P.19 itself that only for a future debt that will arise on 21.5.1997 inclusive of future interest only a sum of Rs.2,00,489 will be due to the complainant, whereas Ex.P.1-cheque was drawn on 31.12.19976. So it is clear that on the date of Ex.A.1, there was no enforceable debt to the tune of Rs.2,00,489/-. Under such circumstances, the above said ratio will not be applicable to the present facts of the case.

8(d) The learned counsel appearing for the appellant also relied on 2005 MLJ (Crl) 26 (Goa Plat (P) Ltd. Vs. Chico Ursula D'Suza). The brief facts of the said case are as follows:-

> "The respondent issued ten post-dated cheque of Rs.40,000 each in favour of the appellant totalling Rs.4 lakhs for payment towards the liability of the amount misappropriated from the

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funds of the appellant Company. The respondent wrote a letter to the appellant denying liability to pay the aforesaid sum for the reasons given in the letter, dated 12.2.1993 (Annexure P-1). The appellant deposited the first cheque for encashment. The said cheque was dishonoured by the bank on the ground that the respondent had issued instructions to stop payment. The appellant sent a legal notice to the respondent regarding the dishonour of the cheque and demanding payment of Rs.40,000/- within fifteen days. As the respondent did not comply with the aforesaid notice, a complaint was filed against the respondent under Section1 42 of the Negotiable Instruments Act (hereinafter referred to as "the Act") for offence punishable under Section 138 of the Act. According to the appellant, the respondent-accused was working as Managing Director of the appellant Company. The services of the respondent were discontinued from the month of July, 1992. The appellant examined its General Manager on their behalf to prove the complaint. The respondent in defence did not examine any witness. The respondent also did not step in the witness box so as to subject himself to the cross-examination. He only brought on record the letter dated 12.2.1993 written by him to the Company. True copy of the advice from the bank dated 12.4.1993, true copy of the complaint dated 6.3.1996 and true copy of the deposition have been marked as Annexures P-2, P-3 and P-4.

The learned Judicial Magistrate, First Class vide order dated 25.8.1995 acquitted the respondent holding that the petitioner failed to prove the liability and also holding that the respondent had rebutted the statutory presumption under Section 139 of the Act. Aggrieved by the said order, the appellant preferred Criminal Appeal No.37 of 1995 to the High Court of Judicature at Bombay which also dismissed the appeal holding that the appellant had failed to prove the liability on the part of the respondent to pay the sum in question. Aggrieved by the judgment and order dated 12.1.1996 of the High Court of Bombay in Criminal appeal No.37 of 1995, an appeal was preferred before the Honourable Apex Court, wherein it has been held by the Honourable Apex Court as follows:-

> It has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by contermanding payment payment of post dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section1 38 a dead letter and will provide a handle

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to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow, and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. . . . . .

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. . . . The object and the ingredients under the provision, in particular, Section 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to staff but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in the Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee."

The facts of the above case will not be applicable to the facts of the case on hand and because the cheque drawn in the above said case was for an unenforceble debt on the date of drawal of the cheque, whereas in the case on hand even the complainant's own document Ex.P.19 glares at us that on the date of drawl of Ex.P.1-cheque Rs.2,00,489/- was due to the complainant only for the amount of future debt dated 21.5.1997, Ex.P.1-cheque was drawn on 13.12.1996. So I am not at all convinced by the submissions made by the learned senior counsel in this regard. I do not find any perverse attitude in the judgment of the trial Court to warrant any interference from this Court. Point is answered accordingly.

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9. In the result, the appeal is dismissed confirming the judgment in C.C.No.5095/1997 on the file of the Court of VII Metropolitan Magistrate, George Town, Chennai.

Sd/
Asst.Registrar

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Sub Asst.Registrar

ssv

To,

1. The VII Metropolitan Magistrate,
George Town, Chennai.

2. -Do- Thro' The Chief Metropolitan Magistrate,
Egmore, Chennai.

1 cc To Mrs.Gita Asokan, Advocate, SR.6634.
1 cc To Mr.M.Rajaraman, Advocate, SR.6418.

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AKM(CO)
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